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BEFORE THE FEDERAL ELECTION COMMISSION

2006 JUN 29 P 3:14

In the Matter of )

MUR 5563

Kirk Shelmerdine Racing LLC )

**SENSITIVE**

**GENERAL COUNSEL'S REPORT # 2**

**I. ACTIONS RECOMMENDED**

Enter into conciliation with Kirk Shelmerdine Racing, LLC prior to a finding of probable cause to believe and approve the attached conciliation agreement.

**II. INTRODUCTION**

The Commission found reason to believe that Kirk Shelmerdine Racing, LLC ("KSR") made unreported independent expenditures when it placed the logo "Bush-Cheney '04" on both sides on the rear upper quarter panel ("UQP") of a stock car that raced four times in the 2004 National Association for Stock Car Auto Racing ("NASCAR") Nextel Cup racing series.<sup>1</sup> The Commission authorized an investigation to ascertain the approximate value of the communications. During our investigation, we interviewed Kirk Shelmerdine, the sole principal of KSR, and obtained documents and other information from KSR and from some of its sponsors, including ones who displayed advertising on the rear UQP of KSR's stock car during 2004.

We determined that the fair market value of the rear UQP where the "Bush-Cheney '04" logos were displayed was approximately \$3,500 in each of the four races in which KSR displayed it, including one race within 20 days of the 2004 general election. Therefore, \$3,500 per race is the approximate value of KSR's independent expenditures. As the value of each of

<sup>1</sup> The four races were: (1) the September 19, 2004 Sylvania 300 race; (2) the September 26, 2004 MBNA America 400 race; (3) the October 10, 2004 Banquet 400 race; and (4) the October 24, 2004 Subway 400 race.

the independent expenditures exceeded the reporting thresholds, KSR was required to timely file reports with the Commission disclosing them. See 2 U.S.C. §§ 434(c) (independent expenditures in an aggregate value in excess of \$250 during a calendar year) and 434(g) (independent expenditures aggregating \$1,000 or more made after the 20<sup>th</sup> day, but more than 24 hours before the day of an election).

### III. ANALYSIS

During the 2004 NASCAR Nextel Cup season, KSR did not have a primary sponsor.<sup>2</sup> As such, KSR sold advertising space on different locations of the stock car piecemeal to several different entities. Accordingly, we concluded that the 2004 piecemeal value of the rear UQP, the same panel where the Bush-Cheney logo was located, would be an appropriate basis for determining the value of the independent expenditures.

Two KSR sponsors, Renegade Tobacco Company and Second Chance Race Parts, advertised on the rear UQP of the KSR car during the 2004 NASCAR Nextel Cup season. The former sponsor purchased that space in three races, paying an average of \$4,166 per race for it, or approximately \$12,500 for the three races. In lieu of a \$5,000 payment from KSR, the latter sponsor negotiated to receive advertising on the rear UQP in two races, an average of \$2,500 per race. By adding together the \$12,500 and \$5,000 (\$17,500), and dividing by the five races, we

<sup>2</sup> The rear UQP is among the most desirable areas for advertising on a NASCAR Nextel Cup stock car, see Al Levine, *Liquor sponsors to stress moderation*, Atlanta Journal-Constitution, February 20, 2005, and as such is generally included in primary sponsorship packages. Primary sponsorship generally buys a decal on the hood, rear quarter panel and TV panel (just above the rear bumper). Preceding the activity in question, KSR had only one primary sponsor, Natural Foods, Inc. ("NFI"), and that was during the 2002 NASCAR Winston Cup (the predecessor to the Nextel Cup) series. In 2002, NFI told us that it paid \$375,000 in KSR's operating costs in exchange for, among other things, advertising placement at several locations on the car, including the rear UQP. In his interview with us, Kirk Shelmerdine stated that NFI's sponsorship dissolved in 2002 by mutual agreement. In 2003, KSR did not enter any NASCAR Winston Cup series races. Shelmerdine's inability to secure primary sponsorships during the 2004 NASCAR Nextel Cup season resulted from the economic reality that Shelmerdine was a less-desirable "field-filler" driver during that time-period. See the First General Counsel's Report at p. 6.

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1 calculated a 2004 per race value for the rear UPQ of \$3,500. We discuss the two fact patterns  
2 below.

3 **A. Renegade Tobacco Company**

4 In three races at the start of the 2004 NASCAR Nextel Cup season, Renegade Tobacco  
5 Company ("RTC") paid to advertise on the rear UQP and TV panel areas of the KSR car.  
6 Specifically, according to its subpoena response, RTC paid: (1) \$10,000 for the February 15,  
7 2004 Daytona race; (2) \$7,500 for the February 22, 2004 Subway 400 race; and (3) \$7,500 for the  
8 March 21, 2004 Carolina Dodge Dealers 400 race. In exchange for these payments, RTC  
9 displayed the word "Tucson" (the name of one of RTC's brands) and a five point gold star  
10 contained within a gold circle on the rear UQP and TV panel. RTC stated in a letter to us "there  
11 was no breakdown in sponsorship payments for the TV panel or the upper rear quarter panels."  
12 According to RTC, it "negotiated a lump payment for those areas" and did not discuss "only the  
13 TV panel, or only one or both of the upper rear quarter panels." Therefore, it appears that RTC  
14 valued the rear UQP and the TV panel equally. As such, RTC paid \$5,000 for the rear UQP at  
15 the Daytona event and \$3,750 for it at the subsequent two events. The table below reflects this  
16 outcome and the average value of \$4,166 per race for the rear UQP:

Race	Sponsorship	Amount Attributable to Rear UQP
(1) February 15, 2004 Daytona 500	\$10,000	\$5,000
(2) February 22, 2004 Subway 400	\$7,500	\$3,750
(3) March 21, 2004 Carolina Dodge Dealers 400	\$7,500	\$3,750
TOTAL		\$12,500
AVERAGE		\$4,166 per race

**B. Second Chance Race Parts**

Second Chance Race Parts ("Second Chance") also displayed advertising on the rear UQP of the KSR car during the 2004 NASCAR Nextel Cup season. In response to a subpoena, KSR stated that the placement of its decal "was agreed to as part of a negotiation in price between [KSR] and Rick Russell [of Second Chance] for purchase of a used, damaged race car." In a letter, Rick Russell provided the following details about the transaction:

Shelmerdine stated in our interview that the decal appeared on the rear UQP in two races. NASCAR.com confirms that Second Chance was KSR's sponsor for two races during 2004. Because placement of its decals on the rear UQP represented the consideration for Second Chance selling the car to KSR for \$10,000 instead of the initial asking price of \$15,000, it is appropriate to consider the \$5,000 difference as the value of the advertising space that Second Chance accepted in lieu of that amount. Considering that the decals appeared at two races, we have divided the \$5,000 value by 2, which results in a per race value of \$2,500.

The total sponsorship consideration for RTC and Second Chance to display their advertising on the rear UQP—\$17,500 over five races—results in an average fair market value of \$3,500 per race for that space during the 2004 NASCAR Nextel Cup season. Therefore, it appears that KSR's unreported independent expenditures also had a value of \$3,500 in each of the four races in which KSR displayed the "Bush Cheney '04 decals on the rear UQP because that is what it would have cost the Bush reelection campaign to display them in that space.

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As noted in the First General Counsel's Report at p.3, a press article reported that the space where the "Bush-Cheney '04" decals were placed "rents for as much as \$25,000 a race, but Mr. Shelmerdine feels so strongly about the election he's donated the space." The article quotes Shelmerdine as saying "I guess politically, most people are to my left. . . I'm very much against liberal ways when it comes to politics. This was the way to make our little statement." Don Coble, *Left turns and right leanings[:] NASCAR drivers, car owners and fans trying to help Bush win re-election*, The Florida Times-Union, October 29, 2004. During our investigation, Shelmerdine said he did not recognize the reporter's name and could not recall making the quoted statements. He continued to claim that he displayed the "Bush-Cheney '04" logos in order to draw attention to him and his car.<sup>3</sup> However, to the extent that using attention-grabbing decals as loss leaders might be a device to attract attention from possible future sponsors, Shelmerdine's past business practices do not bear out his using such a device for these purposes. In our interview, Shelmerdine said that he could not recall any other official races in the NASCAR Winston or Nextel series in which KSR had placed decals on the rear UQP free of charge in order to attract future sponsors.<sup>4</sup> Moreover, he told us that displaying the Bush decals did not attract any solicitations or inquiries for sponsorship after the first, second, third, or fourth

<sup>3</sup> In his interview, Shelmerdine said that "Vote for Bush," which was listed on NASCAR.com as the primary sponsor for the KSR car in the races in which it displayed the Bush-Cheney logo, was merely a pseudonym for KSR and not some separate entity, noting that he had "dreamed it up." He confirmed that that he had no contact with anyone associated with the Bush-Cheney '04 campaign in connection with the placement of his advertising.

<sup>4</sup> Shelmerdine said he believed that KSR placed a "Vote for Kirk" (Shelmerdine's first name) decal on the hood of the KSR car and possibly on the rear UQP at a 2004 NASCAR Nextel Cup fan promotion exhibition that did not count toward the official NASCAR point standings. The exhibition allowed fans to add a driver to the final starting field by voting via phone and Internet. Shelmerdine stated that the decal may have been placed on the car during the preliminary trials of the event to urge fans to cast votes in favor of adding him to the field. On two other occasions, KSR displayed logos on less desirable areas of its stockcar without charge to the entities named in the logos, as favors or quid pro quos to existing business associates. In the first instance, KSR displayed a logo on the trunk of its car for a Native American tribe associated with the owner of Freddie B's, a regular sponsor. In the other, he displayed a small "Winston Cup Museum" logo on the lower quarter panel; the owner of JKS Motorsports, Inc., a company that gives KSR free decals, also owns that Museum.

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1 race displaying the decal, and that he removed it only because he received notification of the FEC  
2 complaint. Meanwhile, the express advocacy communication on the KSR car may have been  
3 viewed in person or on television by thousands, perhaps even millions, of potential voters in the  
4 2004 Presidential election.

5 **III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

20 **IV. RECOMMENDATIONS**

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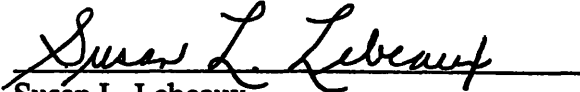
3. Approve the appropriate letters.


Lawrence H. Norton  
General Counsel

Lawrence L. Calvert, Jr.  
Deputy Associate General Counsel  
for Enforcement

6/29/06  
Date

BY:

  
Susan L. Lebeaux  
Assistant General Counsel

  
Roy Q. Lockett  
Attorney

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